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IN THE SUPREME COURT OF THE UNITED STATES

PATRICIA K. LASHWAY, DIRECTOR OF RESIDENTIAL CARE SERVICES, WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES, IN HER INDIVIDUAL CAPACITY, ET AL.,

Petitioners,

v.

CAREPARTNERS, LLC, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PETITIONERS' REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

1. Respondent CarePartners Does Not Contest That The Decision Below Effectively Eliminates Qualified Immunity

The petition explained that the decision below effectively eliminated qualified immunity for public officials enforcing requirements on closely-regulated business for First Amendment retaliation claims. Pet. 22–26. This is because, under the Ninth Circuit's decision, adversarial speech between public officials and a closely-regulated business, in the normal course of regulation, constitutes a prima facie case that protected speech was a substantial or motivating factor in the public officials' decision. Then, the burden shifts to the defendant to prove that the action would have been taken, even in the absence of the protected conduct, which can only be determined by a jury. This effectively eliminates qualified immunity, which is intended to be "an immunity from suit rather than a mere defense to liability[.]" *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009). Thus, qualified immunity "is effectively lost if a case is erroneously permitted to go to trial." *Id.*

Respondent CarePartners does not take issue with the petitioners' assertion that the Ninth Circuit's decision effectively eliminates qualified immunity. Importantly, CarePartners also does not dispute the legitimacy of the fire safety regulations enforced by petitioner. Br. Opp'n 28 ("no one is disputing that the State has a substantial regulatory interest to ensure that citizens within the State of Washington who reside in boarding homes are

protected against the hazards of fire. That is simply not a matter which is within factual dispute."). Like the Ninth Circuit decision, they ignore the need to accommodate the interest represented by the regulatory requirements.

CarePartners makes two points. First, CarePartners argues that this case primarily presents a factual question that is inappropriate for this Court's review. Br. Opp'n 24. However, there is no dispute about the key facts—that the basis for concluding that there was a prima facie case was vague animosity arising because of speech by Mr. Kilkelly in the normal course of regulating boarding homes. According to CarePartners,

> "the only arguably negative interaction [Mr. Kilkelly] had with [the Department of Social and Health Services] in the past was the fact that he had taken issues to an administrative hearing, and had made an unsuccessful effort to lobby [the Department] and elected officials on the issue of receiving an exemption for [the Maple Creek facility]." Br. Opp'n 15.

There is nothing unusual about a closely-regulated business appealing an administrative decision or unsuccessfully seeking an exemption from regulation. Even the evidence, viewed in the light most favorable to CarePartners—that Mr. Kilkelly was "known" to the agency and that an administrator was "losing patience" with him (Br. Opp'n 15), does not fall outside the normal regulatory relationship. Some tension between a regulatory agency and a regulated entity is to be

expected.[1] But CarePartners' argument, accepted by the Ninth Circuit (Pet. 20a–21a), is that this normal interaction between public officials and a regulated entity constitutes a prima facie case of a retaliatory motive, and defeats qualified immunity.

If these normal incidents of a closely-regulated relationship can avoid qualified immunity and get a retaliation claim to a jury, then a specter this Court has repeatedly recognized will be realized. "[T]here is the danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible public officials, in the unflinching discharge of their duties." *Crawford-El v. Britton*, 523 U.S. 574, 590 n.12 (1998) (internal quotation marks omitted); *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982); *Wilkie v. Robbins*, 127 S. Ct. 2588, 2605 (2007). The safety of vulnerable citizens in the State

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[1] The existence of some controversy, or even arguable animosity, does not alter the typicality of the facts. *Blue v. Koren*, 72 F.3d 1075, 1084–85 (2d Cir. 1995) ("Nursing homes are a highly regulated industry, and some tension between operators of homes and regulators is to be expected, as are occasional adversary proceedings. We do not believe that a showing that a rigorous inspection followed a nursing home's victory in an administrative proceeding is a sufficiently particularized showing of improper motive. While such a temporal sequence may fuel a nursing home operator's suspicions, it does not suffice to satisfy the heightened evidentiary standard. Damage actions have collateral effects upon regulators that may impact negatively upon the beneficiaries of the regulation, here some of our most helpless citizens. If a defeat in an administrative proceeding were to be the basis for a damage action brought because of unrelated and otherwise lawful regulatory actions—here mandatory inspections—the regulatory scheme might well be undermined.").

of Washington will be compromised. This is an important issue that requires review by this Court.

CarePartners' second argument is that petitioners can overcome its prima facie case at trial. Br. Opp'n 28. This argument misses the point. Qualified immunity "is effectively lost if a case is erroneously permitted to go to trial." *Pearson*, 129 S. Ct. at 815.

2. The Law Was Not Clearly Established Whether CarePartners Was Required To Plead And Show An Absence Of Probable Cause

In *Pearson*, the Court explained that *Saucier v. Katz*, 533 U.S. 194 (2001), "mandated a two-step sequence for resolving government officials' qualified immunity claims. First, a court must decide whether the facts that a plaintiff has alleged . . . make out a violation of a constitutional right." *Pearson*, 129 S. Ct. at 815–16. "Second, if the plaintiff has satisfied this first step, the court must decide whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct." *Id.* at 816. *Pearson* held that "while the sequence set forth [in *Saucier*] is often appropriate, it should no longer be regarded as mandatory." *Id.* at 818.

In this case, petitioners should have received qualified immunity because, in 2003, when the events took place, it was not clearly established whether the existence of probable cause negated a First Amendment retaliatory enforcement claim against a person who took or sought a criminal or regulatory prosecution. Pet. 33–38.

The Ninth Circuit (Pet. 21a) and CarePartners rely on *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310 (9th Cir. 1989). According to CarePartners, *Soranno's Gasco* and other cases stand for the proposition that "government officials cannot retaliate against citizens for speaking out based on their assertion of First Amendment rights[.]" Br. Opp'n 27. However, both the Ninth Circuit's and CarePartners' reliance on *Soranno's Gasco* is too simplistic. The petition explained that in 2003 there was a conflict in the circuits about whether a plaintiff in a First Amendment retaliation claim must plead and show an absence of probable cause to make a prima facie case. Pet. 36–37.

The Ninth Circuit was required to consider this in its qualified immunity analysis. For example, in *Skoog v. County of Clackamas*, 469 F.3d 1221, 1234 (9th Cir. 2006), the court held that the plaintiff was not required to plead and show probable cause in his retaliation claim. But, that was not the end of the matter. The court granted qualified immunity because the law on this point was not clearly established. According to the court, it "decided only today that a right exists to be free of police action for which retaliation is a but-for cause even if probable cause exists for that action." *Skoog*, 469 F.3d at 1235. However, having established this principle, the court acknowledged that "[a]t the time [the defendant] acted, however, the law was far from clear." *Id.* Thus, "even assuming [the defendant's] primary motivation for seizing [the plaintiff's] still camera was to retaliate for [the plaintiff's] exercise of his First Amendment rights, he violated no clearly established law because probable cause existed for

the search." *Id.* The court concluded that the defendant was "entitled to qualified immunity under the second prong of our qualified immunity analysis." *Id.*

Similarly, in this case, petitioners are entitled to qualified immunity because the law, with regard to the need to plead and show an absence of probable cause, was not clearly established in 2003.[2]

3. The Decision Below That The Probable Cause Standard From *Hartman* Does Not Apply Conflicts With Decisions Of The Sixth And Eighth Circuits

The petition argued that the decision below conflicts with decisions of the Sixth and Eighth Circuits because the Ninth Circuit limited the requirement in *Hartman v. Moore*, 547 U.S. 250 (2006), that a plaintiff plead and prove probable cause, to retaliatory prosecution.[3] Pet. 30–33. CarePartners attempts to reconcile these decisions, but the fact remains that the Ninth Circuit limits *Hartman* to retaliatory prosecution, and the Sixth

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[2] In *Soranno's Gasco* the Ninth Circuit did not decide whether the speech opposing regulatory action should be protected under the First Amendment, because that issue had been conceded by the defendants. Accordingly, that case did not establish any law on that issue.

[3] CarePartners argues that the Court should not grant the writ because the petitioners did not argue *Hartman* in the district court. Br. Opp'n 29. Contrary to CarePartners' claim, this fact is not dispositive. The Court has jurisdiction over this case under 28 U.S.C. § 1254(1), even though the issue was not raised in the district court. The Ninth Circuit considered and decided the issue in the decision below. Pet. 17a n.7.

and Eighth Circuits do not. *Barnes v. Wright*, 449 F.3d 709, 720 (6th Cir. 2006) (applied *Hartman* to grand jury action initiated by conservation officers because "in its analysis, *Hartman* appears to acknowledge that its rule sweeps broadly"); *Cross v. Mokwa*, 547 F.3d 890, 896–97 (8th Cir. 2008) ("there was probable cause to enforce the housing ordinance, the plaintiffs could not succeed on a claim of selective enforcement under the First Amendment with respect to proper code enforcement actions") (internal quotation marks omitted).

It is logical to extend the probable cause requirement beyond retaliatory criminal prosecution. This Court has recognized that, in the context of prosecutorial immunity, "agency officials performing certain functions analogous to those of a prosecutor should be able to claim absolute immunity with respect to such acts." *Butz v. Economou*, 438 U.S. 478, 515 (1978). This is because the "decision to initiate administrative proceedings against an individual or corporation is very much like the prosecutor's decision to initiate or move forward with a criminal prosecution." *Id.* And, in the administrative arena "there is a serious danger that the decision to authorize proceedings will provoke a retaliatory response. An individual targeted by an administrative proceeding will react angrily and may seek vengeance in the courts." *Id.*

CarePartners also argues that there is no material conflict among the circuits, asserting that the circuits agree on the need for probable cause to bridge the gap between the nonprosecuting government agent who instigates the prosecution and the prosecutor who makes the decision to

prosecute. Br. Opp'n 29–30. This is overly simplistic, as the issue is more broadly whether *Hartman's* probable cause requirement applies when the context does not involve an intervening criminal prosecutor. Pet. 30–32; *Williams v. City of Carl Junction, Missouri*, 480 F.3d 871, 876 (8th Cir. 2007) ("*Hartman* is broad enough to apply even where the intervening actions by a prosecutor are not present").

At any rate, this case involves a complex causal situation akin to that addressed by *Hartman*. The petitioners are employees of both the Department of Social and Health Services (DSHS), which regulates boarding homes, and the State Fire Marshal, which is responsible for fire safety. Both addressed regulations under their own purview, and conducted inspections for their purposes. DSHS employees determined whether the residents were ambulatory, and the Fire Marshal determined compliance with fire safety standards. Based on information from both, DSHS imposed conditions on the Alderwood license.

CarePartners claims this was to retaliate because Mr. Kilkelly appealed a civil penalty imposed by DSHS and sought an exemption from DSHS boarding home requirements. However, there is no similar claim that the Fire Marshal had any similar animus against CarePartners or Mr. Kilkelly. Although a criminal prosecutor was not involved in this case, it presents the kind of complexity that justifies the probable cause requirement.

The Court should grant review to resolve the conflict between the Ninth Circuit and the Sixth and Eighth Circuits.

4. Conclusion

For the foregoing reasons, the Petition For A Writ Of Certiorari should be granted.

Respectfully submitted.

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